Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States

ANGELA KHOROZIAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

ANGELA KHOROZIAN
Pro se
198 LAFAYETTE PLACE
ENGLEWOOD, NJ 07631
(201) 784-3565

Pro se petitioner

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QUESTION PRESENTED

1. Whether the District Court Judge violated Petitioner's 5th and 6th Amendment Rights under the United States Constitution in applying the wrong legal standard set forth under *US v. Frady* 456 US 152 (1982), and not applying the now controlling standard set forth in *Massaro v. US*, 538 US 500 (2003).

2. Whether the Third Circuit Panel violated the Petitioner's Due Process rights denying Petitioner's Certification for Appelability and erred in its opinion as a matter of law.

3. Whether the District Court Judge violated Petitioner's 5th Amendment Right under the United States Constitution when neglecting to address all of the constitutional violation issues petitioner raised in her §2255 Motion.

TABLE OF CONTENTS

Pages

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

REASONS FOR GRATING CERTIORARI 1

OPINION AND ORDERS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT OF LAW 3

CONCLUSION 15

APPENDIX

Appendix A: Petition for rehearing or rehearing en banc denial 1a

Appendix B: Third Circuit denial to the Certification of Appealability 3a

Appendix C: The US District Court denial of Certificate of Appealability 5a

Appendix D: Third Circuit Ordered the matter is remanded to District Court for sole purpose of either issuing a certificate of appealability or stating reasons why certificate of appealability should not be issued . 7a

Appendix E: Petition for Certificate of Appealability to the Third Circuit 9a

Appendix F: Petitioner's request for En Banc rehearing 17a

Appendix G: M*assaro v. United States* 538 US 500 (2003) 22a

Appendix H: U. S. Constitutional Amendments V and VI 24a

TABLE OF AUTHORITIES

Page(s)

Cases:

Apprendi v. New Jersey, 530 U.S. 466 (2000) 8, 9

Blakely v. Washington, 124 S. Ct 2531 (2004) . . . 8, 9, 10

Bousley v. U.S., 523 U.S. 614 (1998) 4

Cage v. Lousiana, 498 U.S. 39 10

Holloway v. Arkansas,
435 U.S. 475, 98 S.Ct 1173 (1978) 7

Khorozian, Supra at 509 8

Massaro v. U.S., 456 U.S. 152 (2203) 1, 4, 15

Mcmann v. Richardson, 397 U.S. 759 (1970) 4

Ring v. Arizona, 536 U.S. 610 (2002) 9

Saffle v. Park, 494 U.S. 484 (1990) 9

Shiro v. Summerline, 124 S. Ct 2519 (2004) 9

State v. Hemmer,
3 Neb. App. 769 531a N.W.2d 559 (1995) 14

Strickland v. Washington, 466 U.S. at 668 . . . . . 4, 5, 7

Teague v. Lane, 489 U.S. 288 (1989) 9

Tyler v. Cain, 533 U.S. 656 (2001) 9

U.S. v. Addonizio, 442 U.S. 178 (1979) 3, 4

U.S. v. Calloway,
116 F.3d 1129,
199 Fed. App. 184P (6th Cir 1997) 13, 14

U.S. v. Christo, 614 F.2d 486 (5th Cir 1980) 12

U.S. v. Frady, 456 U.S. 152 (1982) 1, 4, 14

U.S. v. Malpiedi, 62F.3d 465 (2rd Cir 1995) 7

U.S. v. Morelli, 169 F.3d 798 (3rd Cir 1999) 7

U.S. v. Park, 68 F.3d 860 (5th Cir 1995) 12

U.S. v. Yusufu,
63 F.3d 505, 42 Fed. R. Evid. Ser. (LCP) 1062
(7th Cir 1995) 14

Wells v. State, 555 N.E.2d 1366 (1997) 14

Constitutional Provisions

U.S. Const. Amend. V 2, 3

U.S. Const. Amend. VI 2, 3

REASONS FOR GRATING CERTIORARI

1) New Jersey district court judge, William H. Walls failed to properly adhere to legal standards and case law set forth by the US Supreme Court. Judge Walls applied the holding in *US v. Frady,* 456 U.S. 152 (1982) instead of *Massaro v. US*, 538 US 500 (2003), which governs and controls the case at hand relating to ineffective assistance of counsel and the depravation of the rights granted under the 5th and 6th Amendment of the US Constitution.

2) The Third Circuit denied Petitioner's certification of Appelability and doing so failed to adhere to legal standards and case set forth by the US Supreme Court by allowing that the holding of *US v Frady* instead of *Massaro v US*, which governs and controls the case at hand and all other ineffective assistance of cases filed within the Third Circuit.

3) New Jersey court Judge, William H. Walls failed to address other constitutional violation issues presented in Petitioner's §2255 motion and deprived Petitioner's due process rights and violating her 5th Amendment of the US Constitution.

OPINIONS AND ORDERS BELOW

1) Petition for rehearing or rehearing en bank dated October 16, 2006 appears at **Appendix A**.

2) Third Circuit denial to the Certification of Appealability under 28 USC § 2253 (c)(1) dated August 29, 2006 appears at: **Appendix B**.

3) The United States District Court of New Jersey denial of Certificate of Appealability dated December 21, 2005, appears at: **Appendix C**.

4) Third Circuit Ordered the matter is remanded to District Court for sole purpose of either issuing a certificate of appealability or stating reasons why certificate of appealability should not be issued. Order dated October 21, 2005, appears at: **Appendix D**.

5) The US District Court of New Jersey denial of Petitioner's §2255 Motion, appears at: **Appendix E**.

JURISDICTION

Jurisdiction over this post-conviction remedy exists under the statutory framework of 28 U.S.C 2255 which permits post-conviction relief. The petitioner's judgment of conviction became final on October 20, 2003 when the United States Supreme Court denied her Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional provisions involved in this case are U.S. Const. Amendment V and Amendment VI.

STATEMENT OF THE CASE

Petitioner, Angela Khorozian, a middle age women and mother of three, has filed a §2255 motion that was denied by the Honorable William H. Walls, which was the same Judge that presided over the criminal trial. Petitioner later filed a certificate of appealability to the Third Circuit, which was

also denied. Finally, Petitioner timely petitioned the Third Circuit for an En Banc rehearing, which once again was denied. Petitioner now files this writ to the United States Supreme Court for hearing on merits. It is important to note that Petitioner never had an opportunity to file a formal brief to the Third Circuit, depriving her of her Constitutional rights.

ARGUMENTS OF LAW

I. CAUSE AND PREJUDICE

A motion to vacate, set aside, or correct a sentence, pursuant to §2255 must allege one of three bases for relief:

1) An error of constitutional magnitude
2) A sentence imposed outside the statutory limits
3) An error of fact of law, which was so fundamental as to render the entire proceedings invalid.

United States v. Addonizio, 442 U.S. 178 (1979). In the case at bar, errors of constitutional magnitude were committed which included those of such a fundamental nature that the entire proceedings lacked due process integrity. Petitioner can provide evidence sufficient to prove these violations of her rights to due process.

Petitioner seeks to vacate and set aside her conviction and sentence because of errors, which occurred at her criminal trial and also on appeal, including acute violations of the Petitioner's Fifth Amendment rights and denial of her rights to effective assistance of counsel in violation of the Sixth Amendment.

When such errors occur and actual prejudice results, §2255 provides for collateral review. See *United States v. Frady,* 456 U.S. 152 (1982) and in *Massaro v. U.S.*, 538 U.S. 500 (2003). To prevail in a collateral review under §2255, a party must show an error was made and that there was prejudice to the defendant as a result. It is also well established that in the absence of cause and prejudice, a claim not raised under direct review may be raised in a §2255 motion if the Petitioner can demonstrate that he is actually innocent of the underlying crime. *Bousley v. United States,* 523 U.S. 614 (1998). Herein, Petitioner can show error, prejudice and her underlying innocence.

II. PETITIONER DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE UNDERLYING CRIMINAL PROCEEDINGS.

A. COUNSEL'S IMPROPER ACTIONS EFFECTIVELY BARRED PETITIONER FROM EXERCISING HER ABSOLUTE RIGHT TO TESTIFY IN HER OWN DEFENSE.

The Sixth Amendment to the United States Constitution states that all criminal defendants have a right to receive effective legal representation. Foregoing that right meets the "error of Constitutional magnitude" standard outlined in *Addonizio.*

The Sixth Amendment also requires that a criminal defendant receives "effective" representation. *Mcmann v. Richardson,* 397 US 759 (1970). Effective representation is essential as the means through which the other rights of the person on trial are secured. *Strickland v. Washington,* 466 U.S. 668 (1984).

In *Washington,* the Supreme Court set a two prong test for identifying ineffective assistance of counsel. Counsel's performance is ineffective if it falls below an objective standard of reasonableness. The Petitioner must also show a reasonable probability that, but for counsel's errors, the results of the proceeding would have been different. *Id.* at 688, 694. Counsel has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland,* 466 U.S. at 688.

At trial, Angela Khorozian sought to exercise her constitutional right to testify, but was effectively barred from doing such because her attorney threatened to abandon the case if she asserted her right to testify. Petitioner's efforts to find a new lawyer in the middle of trial were unsuccessful. Petitioner was then terrified at the thought of being left without an attorney, and thereby forfeited her right to testify. Had Petitioner been able to testify, she would have been able to refute the testimony of Eduardo Queirolo, who was offered leniency for his own crimes if he testified against Petitioner. Also, had she been permitted to testify, a facsimile that defense counsel attempted to have admitted, but was denied, would have been admitted, and helped to clear Petitioner. Therefore, there is a reasonable likelihood the outcome of the trial would have been different if Petitioner had refuted this testimony of a key witness against her and had a key document admitted. Thus, her conviction is tainted as must be reversed.

B. COUNSEL'S CONFLICTS OF INTEREST IMPAIRED HIS DEFENSE OF PETITIONER.

Petitioner wanted to call two witnesses, Madeline Wasserman and Shelly Wengrovsky to testify as to her reputation for honesty in the community, her success as a

businesswoman and her law abiding nature. Mrs. Wasserman had further knowledge of the business venture subject of this matter.

Unbeknownst to Petitioner, defense counsel had a close relationship and had further previously represented Mrs. Wasserman in a criminal proceeding and knew that she had been convicted of a crime. Counsel never disclosed this information to Petitioner inasmuch as the information would have been detrimental to Mrs. Wasserman's business relationship with Petitioner. Counsel threatened to quit if forced to call Mrs. Wasserman who never had disclosed to Petitioner that many years ago she had been convicted of a crime.

Shelly Wengrovsky, formerly an agent with the IRS and with ATF was aware that many years earlier, Mrs. Khorozian had served as a whistle blower and government informant concerning criminal activity by her employer. Petitioner wanted Mr. Wengrovsky to testify as a character witness to state that Petitioner had give up a high paying executive position and put herself and her family at risk to aid the government in a criminal investigation. However, defense counsel refused to call Agent Wengrovsky and offered no explanation. Petitioner later learned that defense counsel had represented the target of that criminal investigation.

The Third Circuit has devised a relatively simple two-prong test to gauge an ineffectiveness of counsel claim based upon an actual conflict of interest:

1) Petitioner must demonstrate that some plausible alternative defense attorney or tactic might have been pursued. Petitioner need not show that the defense would necessarily have been successful if it had been

used, but that it possessed sufficient substance to be a viable alternative.

2) Petitioner must establish that the alternative defense was inherently in conflict with, or not undertaken due to the attorney's other loyalties or interests. *United States v. Morelli,* 169 F.3d 798 (3rd Cir. 1999).

Once these essentials are established, then the prejudice component, normally necessitated by *Strickland,* to sustain an ineffectiveness claim, is presumed and need not be proved. *Morelli,* 169 F.3d at 810. A defendant represented by conflicted counsel may be disadvantaged in ways that will never be known and may not be apparent on the record. As the Supreme Court pointed out, the true evil of a conflict "is in what the advocate finds himself compelled to refrain from doing." *Holloway v. Arkansas,* 435 U.S. 475, 490, 98 S. Ct. 1173, 1182 (1978). A defendant has a constitutional right to an attorney "who can make strategic and tactical choices free from any conflict of interest." *United States v. Malpiedi,* 62 F.3d 465 (2nd Cir. 1995).

It is unethical for counsel to undertake a representation where counsel's actions are restricted by his duties to prior clients. R.P.C. 2.1 provides:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors, that may be relevant to the client's situation.

Counsel cannot be independent if he has secret allegiances to other clients. Counsel who violate this ethical standard

provide assistance below the reasonably expected standard of an attorney. RPC 1.7. In the case at bar, defense counsel had such secret allegiances, which necessarily caused him to provide assistance below the reasonably expected standard, and was therefore ineffective.

III. PETITIONER IS ENTITLED TO A NEW TRIAL IN ACCORDANCE WITH BLAKELY V. WASHINGTON

In *Blakely v. Washington,* 124 S.Ct. 2531(2004), the Supreme Court of the United States ruled that where a prisoner's sentence is increased by judicial fact finding rather than jury fact finding, the increased sentence violates the trial by jury requirement of the Sixth Amendment.

It is clear that Petitioner raised the issue in the Third Circuit Court of Appeals. *Khorozian,* supra at 509. The Court of Appeals ruled that it was permissible for the District Court to find that Khorozian's intended loss to the bank was in fact $20 million. This fact was never submitted to the jury and Petitioner submits that it is not supported by the evidence adduced at trial.

In *Blakely,* supra, the Supreme Court struck down the enhancement of a defendant's sentence which had been increased due to the court finding that the crime for which the defendant was charged was done in a particularly cruel or heinous manner.

In *Blakely,* supra, the Supreme Court relied on *Apprendi v. New Jersey,* 530 U.S. 466 (2000) to reach its conclusions. Although *Apprendi* has not been held to be retroactive, Petitioner argues that *Blakely* is applicable and must be applied retroactively.

In *Tyler v. Cain* 533 U.S. 656 (2001), the United States Supreme Court held that a new rule of criminal procedure may be made retroactive over the course of cases. Since *Apprendi* was decided, cases make it clear that *Apprendi* must now be considered to be retroactive and therefore *Blakely* must be retroactive as well.

In *Teague v. Lane, 489 U.S. 288 (1989),* the court held that new procedural rules would not be applied retroactively to cases on collateral review. One exception requires that a new rule be applied retroactively for those procedures that are implicit in the concept of ordered liberty. *Id. at 311.* Such rules vindicate two distinct concerns; the fundamental fairness of the underlying proceeding; and the accuracy of that underlying criminal proceeding. *Saffle v. Parks*, 494 U.S. 484 (1990).

In *Shiro v Summerline* 124 S. Ct. 2519 (2004), the Supreme Court held that the decision in *Ring v Arizona,* 536 U.S. 610 (2002), applying *Apprendi* to Arizona's capital sentencing scheme does not apply retroactively under *Teague.* The court held that the rule at issue was fundamental. *Id* at 3. The majority of the justices concluded that judicial fact finding under a reasonable doubt standard was not shown to seriously diminish the accuracy of sentencing. *Id.* at 2525. That conclusion, Petitioner submits, is because Arizona law already required aggravating factors to be proved beyond a reasonable doubt.

Because the rule at issue here allowed judicial fact-finding under the diluted preponderance of the evidence standard, *Shiro's* ultimate conclusion that accuracy is not seriously diminished where a judge makes findings beyond a reasonable doubt is inapposite.

The requirement of proof beyond a reasonable doubt is central to protecting the rights of the accused and the accuracy of criminal convictions. *See Cage v. Louisiana* 498 U.S. 39. It is a prime instrument for reducing the risk of convictions resting on factual error. *Cage,* supra at 498 U.S. 39.

"Due process commands that no man shall lose his liberty unless the Government has borne the burden of...convincing the fact finder of his guilt. To this end the reasonable doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *Id. at 364.*

In accordance with the Sentencing Guidelines, Petitioner's offense level was a six. USSG 2F1.1(a), 18U.S.C.A. However, due to the amount of monies alleged that the Petitioner had attempted to take, the level was elevated to offense level 22.

The raising of the base level from 6 to 22 violates the dictates of *Blakely* because there was no finding by the jury that Petitioner actually intended to defraud the bank of $20,000,000. The jury might well have convicted Petitioner of bank fraud for a myriad of other reasons such as opening the account in the name of a defunct corporation. Therefore, the escalation of the offense which began of offense level 1 to offense level 22 was unwarranted in accord with *Blakely*.

The elevation of the crime, 22 offense levels, without a finding by a jury that intended that the bank lose this amount violated Petitioner's constitutional right to a trial by jury.

IV. PETITIONER IS ENTITLED TO A VACATION OF HER SENTENCE AS SHE IS ACTUALLY INNOCENT.

The Petitioner is actually innocent. To be sure, far too many defendants make such claims, both prior to adjudication and while incarcerated. However, the present case is one of those rare examples of an innocent individual being found guilty by association and without any independent evidence elicited at trial. Petitioner went to the bank and opened an account in the name of a Corporation, which was defunct. However, John Demetrius Petitoner's former account of almost 20 years and a 10 year member of the board and agent for the bank subject of this matter, had been commission and given the authority by the Petitioner to reinstate the Corporation. John Demetrius' firm had in fact secured a tax identification number for the company prior to sending Petitioner to the bank to open the account. Petitioner did not realize that more had to be done to activate the dormant corporation.

Evidence presented at trial by the prosecution support that Petitioner had no knowledge the checks she deposited that were given by an investor to her associate Queirolo for a business venture, were counterfeit. Petitioner's associated of fifteen years a prominent businessman from Brazil who unbeknownst to Petitioner was bankrupt and facing similar bank fraud charges in Brazil brought the checks to the United States. Petitioner's associate Queirolo, the co-defendant and the government's star witness, testified that he had investigated the validity of the checks through a financial institution in Uruguay that confirmed that the checks were good. When this came to light through the cooperation of Queirolo the government filed a superceding indictment against Petitioner that no longer accused the Petitioner of

depositing checks that she knew were counterfeit. The government proceeded against Petitioner with charges of bank fraud and conspiracy to commit bank fraud based on the claim that Petitioner 1) opened an bank account with a company that had lost its corporate status with the State, 2) misrepresenting that the bank account was to be funded with a wire transfer and later depositing checks, 3) misrepresenting that the funds were to be use for the purchase of sugar plantation rather than a hotel business venture, 4) misrepresenting the identity of her companion when she deposited the checks. None of the claimed misrepresentation support the intent to defraud the bank. Petitioner couldn't had any intent to defraud the bank of its own fund as she believed she was depositing good check to a good bank and regardless if the funds were to be used for the purchase of a sugar plantation or a hotel business it was for a legal business venture.

It is not a criminal act to violate a banking provision. Evidence of violations of civil banking regulations cannot be used to establish criminal conduct. *United States v. Christo,* 614 F.2d 486 (5th Cir. 1980) and *U.S. v. Park* 68 F.3rd 860 (5th Cir 1995).

The Petitioner did not introduce Queirolo as Teixeira, the investor. Queirolo the government's own star witness, never testified that he had been introduced as Teixeira. . There was no evidence to show that Queirolo and Petitioner had any meeting of the minds to defraud the bank. Petitioner was convicted because unknown to the Petitioner the Hudson United Bank, the bank in subject matter was under criminal investigation and bank officers of the bank lied to get a better plea deal for the bank and themselves. In fact soon after Petitioner was sentence is when Petitioner first learned, through the media, that the bank had been under criminal investigation for numerous crimes and had entered into a plea

agreement where they paid $6 million dollars to settle the criminal prove against the bank and several bank officer were indicted. Also, Petitioner was convicted because the co-defendant lied to the Government so that he could be released from prison and to secure a favorable plea agreement. Moreover, Petitioner was convicted because her counsel was ineffective as he failed to investigate and uncover crucial evidence, present numerous available witnesses and documentation that would have cleared Petitioner of the charges against her.

On January 25, 2002, after the government rested, Judge Walls realized that the government had not proven their case and that the Petitioner was not guilty of a crime but rather of business negligence. This became evident during Petitioner's motion to dismiss the criminal charges entered after the government rested. At this time Judge Walls stated on the record, page 89 of the trial transcript "that almost sounds like negligence. We are not in negligence, we are in criminality" "On page 91, "Let's freeze that frame for a moment, let's assume that is so, suppose she didn't do it then do we still get back to negligence rather than criminality?" "She deposit checks that they turn to be bad, she is liable, right?" The Prosecution: "She would be civilly liable". However, Judge Walls denied Petitioner's motion to dismiss the charges. The Petitioner is no guilty, she did not commit any crime and no evidence that she did was ever presented to the jury. Petitioner's was convicted because her counsel was ineffective when he didn't properly sited the law that would have educated the jury as to what constitutes criminal intent.

In American Jurisprudence – Intent Obstruction §37, §12, §516, §26-37 it states "In the context of an attempt "specific intent" means that the defendant consciously Intents to completion of the acts comprising the Choate offense in the

completion of such acts is the defendant's purpose *U.S. v. Calloway* 116 F.3d 1129, 199F Fed App 184 P (6th Cir 1997). Consequently the defendant must act intentionally, and as NEITHER NEGLIGENCE NOR RECKLESSNESS includes specific intent, as required for crime of attempt. *Wells v. State* 555 N.E. 2d 1366 (1997), *State v Hemmer* 3, Neb. App. 769. 531 a N.W. 2d 559 (1995).

Observation Implicit in the meaning of attempt is the WILL of the actor to accomplish the act attempted there is no such thing as attempted negligence or attempted recklessness. *U.S. v. Yusufu* 63 F.3d 505, 42 Fed R. Evid Ser (LCP) 1062 (7th Cir 1995). To establish an attempt the state must thus prove the defendant acted with culpability".

V. OTHER ERRORS

The District Court judge erred in his denial of the §2255 Motion and not addressing other constitutional violation issues presented by Petitioner. The District Court judge erred in his denial of the §2255 Motion on the trial level by applying the wrong standard of review and not addressing other constitutional violation presented in Petitioner's §2255 Motion. The Third Circuit Panel erred in not allowing the Plaintiff to have the opportunity to file a brief on appeal. The Third Circuit Panel erred in its opinion as a matter of law. Further, the panel committed legal error in denying Plaintiff's certificate of appealability. Judge Walls, the U.S.D.J., stated on the record the following during arguments for the Motion to Vacate, "I frankly, gentleman and lady, find no merit in the motion. I have jurisdiction under 28 USC 2255 and I quote, "to obtain collateral relief, a petitioner or prisoner must clear a significantly higher hurdle that would exist on direct appeal. That is taught to us by United States v. Frady, 456 U.S. 152 at 162. That's been our law since 1982. When

raising, when pursuing a §2255 motion, a petitioner has to show cause for not having raised the point in question on direct appeal and that there will be actual prejudice from the error asserted".

Under *Massaro v. United States* 538 U.S. 500 (2003), the United States Supreme Court concluded unanimously in 2003 that "The procedural default rule in neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective assistance of counsel claims on direct appeal does not promote these objectives.

CONCLUSION

WHEREFORE, in consideration of the foregoing, the Petitioner prays this court to issue an order vacating the conviction and sentence previously imposed to due the errors of constitutional magnitude outlined herein. In the alternative, Petitioner requests an evidentiary hearing at which time evidence further supporting the abridgment of her constitutional protections may be submitted to this Court.

Respectfully Submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No.05-4687

[Filed October 16, 2006]

ANGELA KHOROZIAN,
Appellant

v.

UNITED STATES OF AMERICA

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civil No. 04-CV-04879)
District Judge: Honorable William H. Walls

Present: SCIRICA, Chief Judge. SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, VAN ANTWERPEN, CHAGARES, and ROTH*. Circuit Judges

* The vote of the Honorable Jane R. Roth, Senior Judge of the United States Court of Appeals for the Third Circuit, is limited to panel rehearing only.

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by petitioners having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in bane, the petition for rehearing is hereby DENIED.

BY THE COURT:

/s/Marjorie 0. Rendell
Circuit Judge

Dated: October 16, 2006
CMH/cc: VA, GSL

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-4687

[Filed August 29, 2006]

ANGELA KHOROZIAN	)
	)
v.	)
	)
UNITED STATES OF AMERICA	)
	)

Present: RENDELL, AMBRO and ROTH. Circuit Judges.

Submitted is appellant's request for certification of appealability under 28 U.S.C. §2253 (c) (1); in the above caption case.

Respectfully,

MMW/SR

ORDER

In her request for certification of appealability the appellant accurately describes the familiar two-prong test set forth by the Supreme Court in Strickland v. Washington 466 U.S. 668 (1984), for determining whether counsel was

constitutionally ineffective. Curiously, she also cites a decision by this Court, preceding Strickland by some fourteen years, for the proposition that in this Court the Standard is "somewhat more relaxed" to the extent of omitting the prejudice prong altogether. This misunderstanding of the law may in part explain why she fails to demonstrate that she was prejudiced by counsel's alleged deficiencies. Because she has not shown prejudice, no jurist of reason could conclude that she has met the Strickland standard. Accordingly, she has not made a substantial showing of the denial of a constitutional right with regards to any of her claims and we deny her request for a certificate of appealability. 28 U.S.C. §2253 (C)(2); Miller-El v. Cockrell, 537 U.S. 322 (2003).

By the Court,

/s/ Marjorie O. Rendell
Circuit Judge

Dated: August 29, 2006
CMH, cc: VA, GSL

APPENDIX C

UNITED STATES COURT OP APPEALS
FOR THE THIRD CIRCUIT

NO. 05-4687
District Court No. 04-CV-04879

[Filed October 31, 2005]

Khorozian	)
	)
vs.	)
	)
USA	)
	)

ORDER

It appearing that the District Court has not issued a certificate of appealability or stated reasons why a certificate of appealability should not issue pursuant to Rule 22 (b), F.R.A.P. and 28 U.S.C. Section 2253 and that under Third Circuit LAR 22.2 the District Court is required to make a determination as to whether a certificate of appealability should issue at the time a final order is issued; It is hereby ORDERED that the matter is remanded to the District Court for the sole purpose of either issuing a certificate of appealability or stating reasons why a certificate of appealability should not issue. The appeal is stayed pending determination by the District Court.

The record is being returned to the District Court for its consideration and completion of the record. The Clerk of the District Court is to promptly forward the record to the Clerk of the Court of Appeals after entry of the District Court's determination regarding the certificate of appealability.

For the Court,
MARCIA M. MALDRON
Clerk

Date: 10/31/2005

cc: Honorable William H. Walla
Mr. William T. Walsh
Edward J. Bilinkas, Esq.
Michele Brown, Esq.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 04-04879 (W11W)

[Filed December 21, 2005]

ANGELA KHOR0ZIAN Petitioner,	)
v.	)
UNITED STATES OF AMERICA Respondent.	)

ORDER

Walls. District Judge

This matter having been presented to the Court on remand from the United States Court of Appeals for the Third Circuit, for the sole purpose of either issuing or denying a Certificate of Appealability tor the Petitioner Angela Khorozian, the Court having reviewed and considered the record, the Court denies the Certificate of Appcalabiliiy in this matter pursuant to KR-A.P. Rule 22(b) and 28 U.S.C. § 2253 tor the reason's explicated in the Order or September 19,2005, by reference to this Court's decision of September 13, 2005. Because the Plaintiff did not make a reasonable showing of a constitutional

violation as required by 28 U.S.C. § 2253(c)(2), it is on his 21 day of December, 2005:

ORDERED that a Certificate of Appealability shall not be issued.

William H. Walls, U.S.D.J.

APPENDIX E

IN THE COURT OF APPEALS FOR THE THIRD CIRCUIT

Docket No. 05-4687

[Filed February 21, 2006]

ANGELA KHOROZIAN	)
Plaintiff	)
	)
V.	)
	)
UNITED STATES OF AMERICA	)
Defendant	)
	)

APPLICATION FOR CERTIFICATE OF APPEALABILITY

INTRODUCTION

Petitioner Angela Khorozian was convicted of one count of bank fraud, in violation of 18 U.S.C. section 1344(1). She was sentenced to a period of incarceration. She appealed her conviction to this court. The appeal was denied, and petitioner completed her sentence of incarceration. The record below is not clear as to whether or not a habeas corpus petition, pursuant to 28 U.S.C. sections 2253-2255, was filed on her behalf. Likewise, it is not clear whether or not such a petition, if filed, was appealed. A motion to set aside her

conviction was denied below. This is a request for review of that decision.

NECESSITY OF CERTIFICATION OF APPEALABILITY

It would appear that a Certificate of Appealability is part and parcel of a habeas corpus proceeding. (Please see the first sentence of the clerk's letter of January 30, 2006, annexed as Exhibit A). Having served the custodial portion of her sentence, petitioner is no longer incarcerated. However, petitioner continues to suffer the collateral consequences of her conviction. She must submit to probation requirements, including supervision of her probation officer, and continued payments of a substantial fine. In addition, surrender of her passport (please see Exhibit B, annexed) implicates her liberty interest as guaranteed by the 14th Amendment to the U.S. Constitution.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges ineffective assistance of both trial counsel and appellate counsel. It is the policy of the Third Circuit to defer consideration of such allegations to a post conviction relief application so that an adequate record can be assembled. Claims of ineffective assistance of counsel are normally not cognizable on direct appeal. United States v. Givan, 320 F.3d 452, 464-465 (3rd Cir. 2003); United States v. Mustafa, 238 F.3d 485, 497 (3rd Cir. 2001). It is respectfully submitted that the within matter, not arising under 28 U.S.C. sections 2253-2255 as a habeas corpus proceeding, and despite completion of her custodial sentence, is reviewable as a request for a Writ of Error Coram Nobis, 28 U.S.C. 1651(a); United States v. Baptiste, 223 F.3d 188, 189 n. 1 (3rd Cir. 2000); United States v. Kwan, 407 F.3d

1005, 1012-1013 (9th Cir. 2005). Trial counsel failed to perform effectively in several respects. Trial counsel acknowledged, on the record at defendant's sentencing, that he either did not understand the government's theory of the case, or was surprised at the jury instructions as to the requisite mental state on the fraud issue. Also, when a key defense witness had to leave the country due to his wife's illness, trial counsel failed to ask for a continuance until his return. Another essential witness, a banking expert, was never produced, or, it seems, even thought of be defense counsel. Each error or oversight, either individually or taken together, was fatal to the presentation of petitioner's defense before the jury.

Finally, trial counsel participated actively in her appeal and appellate counsel appeared on defendant's behalf at the sentencing proceeding below. Such a co-mingling of roles belies an inherent conflict of interest making a bona fide claim of ineffective assistance of predecessor counsel impossible on direct appeal.

I. TRIAL COUNSEL BELOW ACKNOWLEDGED THAT HE DID NOT UNDERSTAND THE THEORY OF CRIMINAL LIABILITY UNTIL THE TRIAL WAS WELL UNDER WAY.

At the sentencing, trial counsel said the following: "You (the trial judge) submitted this case to the jury on the theory of fraud that permitted the jury to conclude that Mrs. Khorozian could have defrauded the bank in a number of ways that had nothing to do with the belief that the checks were no good. And it took me awhile before I understood what you were doing, but I finally did understand it. It is conceivable, perhaps, that one could go to a bank with checks that they believed were good and still defraud it. And the

way that could happen is if Mrs. Khorozian went to the bank and defrauded the bank out of its services which the bank would have chosen not to provide Mrs. Khorozian had it known the truth." (Exhibit C).

Such an admission of counsel below, on the record, is a rarity. In and of itself, without reference to any other errors below, it falls below the standard of objective reasonableness required of trial counsel. It remains unclear exactly when trial counsel grasped the theory of liability as applied to these facts, specifically, that the government need not prove defendant's actual knowledge that the checks in question were counterfeit.

II. TRIAL COUNSEL BELOW FAILED TO REQUEST A CONTINUANCE WHEN A KEY WITNESS WAS CALLED OUT OF THE COUNTY.

As set forth in the motion below, trial counsel failed to seek a delay in the trial until the return of a witness called out of the county due to the illness of a relative. The witness was key to showing the bona fide nature of the investment project the defendant was undertaking in that country, The Republic of Chad. (Exhibit D). Continuing with the trial in the absence of a material witness allowed that portion of the governments' case, that the foreign investment was not real, to go unanswered in the jury's eyes. Such a lapse surely falls below any standard of objective reasonableness, making the defense of the reality of the Chadian investment impossible to maintain.

III. TRIAL COUNSEL FAILED TO OBTAIN A BANKING EXPERT.

In the case below defendant was accused of an involved plot to defraud bank. Surely normative standards of banking practice were relevant to petitioner's defense. For instance, key to the government's case was that defendant put forth a defunct corporation as opening an account at this bank. Whether or not the bank had a duty of inquiry would appear to be a key element of defendant's conviction. Yet there was no indication of an inquiry as to relevant banking standards by trial counsel.

IV. TRIAL COUNSEL ALLOWED INFORMATION AS TO COUNTERFEIT CHECKS TO GO BEFORE THE JURY, THROUGH THEIR COUNTERFEIT NATURE WAS NOT PART OF THE GRAVAMEN OF THE GOVERNMENT'S CASE.

As is made clear at the argument of the motion below, trial counsel, who has admitted not understanding the government's case, made no attempt to keep the counterfeit nature to the checks from the jury. Clearly their counterfeit nature had the capability to prejudice the jury against the defendant. (Exhibit E).

V. TRIAL COUNSEL PUT THE WRONG WITNESS ON THE STAND.

Parts of the trial could truly be said to be farcical. At one point, trial counsel put a witness on the stand who was, supposedly, an accountant for the bank. It turned out that he was the son of the intended witness, also an accountant. (Exhibit F).

VI. TRAIL COUNSEL AND APPELLATE COUNSEL WERE, CONSTRUCTIVELY AND ACTUALLY, ONE AND THE SAME, MAKING AN INEFFECTIVE ASSISTANCE TO COUNSEL CLAIM IMPOSSIBLE TO MAINTAIN ON DIRECT APPEAL, AND CREATING A FATAL CONFLICT OF INTEREST ON THE PART OF APPELLATE COUNSEL.

As is clear from the record below, trial counsel, Ivan Fisher, participated actively with appellate counsel, Herald Price Fahringer. In addition, appellate counsel Fahringer participated below as well, though no earlier than the sentencing stage. An ineffective assistance of counsel claim is, thus, impossible due to the inherent conflict of interest associated with both trial counsel and appellate counsel conducting the appeal of their own case. In other words, an ineffective assistance of counsel claim was impossible to bring up prior to this point in the proceedings. Annexed are the cover pages of the appendix on appeal indicating Mr. Fisher's participation, as well as the sentencing transcript below, indicating Mr. Fahringer's active participation at that stage. (Exhibit G).

VII. THE STRICKLAND TEST AS APPLIED TO THE FACTS BELOW.

The Supreme Court, in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), held that petitioner must demonstrate that counsel's performance fell below an "objectionable standard of reasonableness." Id. at 688, 104 S.Ct. at 2064. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the

Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. at 687, 104 S.Ct. at 2064.

In the Third Circuit, the standard is somewhat more relaxed. If counsel's performance did not meet the standard of reasonably competent counsel it is deemed to have been ineffective. Moore v. United States, 432 F.2d 730 (3rd Cir. 1970).

An admission, on the record, that trial counsel did not understand the theory of the government's case, i.e., that it need not show that the defendant knew of the counterfeit nature of certain checks, is fundamental to her defense. Indeed, the failure to grasp the nature of the government's case prevented defendant from mounting a meaningful defense on the factual issue that was important: That is the reality of the overseas investment project, and the relevance of corporate status to opening a bank account. As we see, trial counsel allowed the trial to continue despite the absence of a key witness, one with knowledge of the project itself. Finally, because of the inherent nature of the conflict presented by trial counsel and appellate counsel being, constructively speaking, one and the same, an ineffective assistance of counsel claim was impossible up to this point as against either counsel. Also, effective assistance of appellate counsel must now be questioned as well.

As stated, it is the preference in this circuit to present ineffective assistance of counsel claims on motion where an adequate record can be set forth. Finally, though defendant has served the custodial portion of her sentence, she continues to bear the burden of her conviction and sentence, having to

report to a probation officer, to continue to pay the requisite fine, and to forego her passport.

CONCLUSION

Petitioner therefore respectfully requests that this court of appeals hear her ineffective assistance of counsel claim and consider de novo the refusal of the court below to set aside her conviction.

Respectfully submitted,

Martin V. Asatrian
Counsel for Petitioner

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4687

[Filed October 2, 2006]

ANGELA KHOROZIAN	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES OF AMERICA	)
Defendant,	)
	)

PETITION FOR REHEARING OR REHEARING EN BANC

RULE 35 (b) (1) STATEMENT

I express a belief, based on reasoned and studied professional judgment, that this appeal involves a question of exceptional importance concerning the constitutionality of a provision of federal law:

Whether the District Judge error in denying plaintiff's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 substantially deprived Ms. Khorozian of

her protections afforded to her under the Fifth and Sixth Amendment of the United States Constitution.

/s/
Martin V. Asatrian
Attorney at Law

STATEMENT OF THE ISSUE

Whether the plaintiff, Ms. Khorozian, was deprived of her Fifth and Sixth Amendment Rights under the United States Constitution, when Judge Walls, the United States District Judge, denied plaintiff's Motion to Vacate, under 28 U.S.C. § 2255, failed to apply the proper legal standard in deciding the Motion resulting in violations of the plaintiffs Fifth and Sixth Amendment Rights under the United States Constitution.

INTRODUCTION

The panel in this case denied the plaintiff her request for a certificate of appealability. Its conclusion was based on the assertion that Ms. Khorozian has not made a substantial showing of the denial of the constitutional right with regard to any of her claims. The Panel further stated that the plaintiff has not shown prejudice, no jurist of reason could conclude that she met the **Strickland** standard. This on-the-record review and the denial of the certificate of appealability contravenes longstanding rules of judicial review and merits en banc consideration.

STATEMENT OF THE CASE

1. The Panel Opinion

Present: RENDELL, AMBRO, AND ROTH, Circuit Judges.

Submitted is appellant's request for a certificate of appealabity under 28 U.S.C. §2253(c)(1); in the above-captioned case.

THE PANEL OPINION

In her request for a certificate of appealability the appellant accurately describes the familiar two-prong test set forth by the Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), for determining whether counsel was constitutionally ineffective. Curiously, she also cites a decision by this Court, preceding Strickland by some fourteen years, for the proposition that in this Court the standard is "somewhat more relaxed" to the extent of omitting the prejudice prong altogether. This misunderstanding of the law may in part explain why she fails to demonstrate that she was prejudiced by counsel's alleged deficiencies. Because she has not shown prejudice, no jurist of reason could conclude that she has met the Strickland standard. Accordingly, she has not made a substantial showing of the denial of a constitutional right with regard to any of her claims and we deny her request for a certificate of appealability. 28 U.S.C.§ 2253(c) (2); Miller-El v.Cockrell, 537 U.S. 322 (2003).

ARGUMENT

The panel committed legal error in denying plaintiff's certificate of appealability. Judge Walls stated on the record (the transcript was furnished to the panel for review and

examination page 59 and 60) the following during the Motion to Vacate, "I frankly, gentlemen and lady, find no merit in the motion. I have jurisdiction under 28 U.S.C. 2255 and I quote, "to obtain collateral relief, a petitioner or prisoner must clear a significantly higher hurdle that would exist on direct appeal. That is taught us by United States versus Frady 456 U.S. 152 at 162. That's been our law since 1982...When raising, when pursuing a 2255 motion, a petitioner has to show cause for not having raised the point in question on direct appeal and that there will be actual prejudice from the error asserted."

Under Massaro versus United States, the United States Supreme Court concluded that, "The procedural default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. We conclude that requiring a criminal defendant to bring ineffective assistance of counsel claims on direct appeal does not promote these objectives. The Court further opined that, "In light of the way our system has developed, in most cases a motion brought under 2255 is preferable to direct appeal for deciding claims of ineffective assistance of counsel. The Court further opined in Massaro that, "Subjecting ineffective-assistance claims to the usual cause-and-prejudice rule also would create perverse incentives for counsel on direct appeal."

CONCLUSION

This Court should grant rehearing en banc and uphold the constitutionality of Title II's abrogation as valid Section 5 legislation.

Respectfully submitted,

/s/_____

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1135 Broad Street, Suite 211
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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2001, two copies of the foregoing Petition for Rehearing En Banc For the United States as Intervenor were served by Federal Express, next business day delivery on the following

George S. Leone, Appellate Division
U.S. Attorney
970 Broad Street
Newark, NJ 07101

APPENDIX G

IN THE SUPREME COURT OF UNITED STATES

No. 01-1559

[Filed February 25, 2003]

JOSEPH MASSARO,)
Petitioner)
)
V.)
)
UNITED STATES)
)

Washington, D.C.
Tuesday, February 25, 2003

The above – entitled matter came on for oral argument before the Supreme Court of the United States at 10:13 a.m.

APPEARANCES:

HERALD P. FAHRINGER, ESQ., New York, New York; on behalf of the Petitioner.

SRIKANTH SRINIVASAN, ESQ., Assistant to Solicitor General, Department Of Justice, Washington, D.C.; on behalf of the Respondent

(see full argument omitted)

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APPENDIX H

U.S. Constitution: Fifth Amendment

Fifth Amendment - Rights of Persons

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution: Sixth Amendment

Sixth Amendment - Rights of Accused in Criminal Prosecutions

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.